

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

VANCE DAVID MURRAY,

Defendant-Appellant.

UNPUBLISHED

August 18, 2009

No. 284095

Oakland Circuit Court

LC No. 2003-189082-FH

Before: Wilder, P.J., and Meter and Servitto, JJ.

PER CURIAM.

Defendant was convicted by a jury of possession with intent to deliver 225 grams or more but less than 650 grams of cocaine. See former MCL 333.7401(2)(a)(ii). Initially, defendant was sentenced as a third-offense habitual offender, MCL 769.11, to five to 60 years in prison. In *People v Murray*, unpublished opinion per curiam of the Court of Appeals, issued June 21, 2007 (Docket No 268836), this Court vacated that sentence and remanded for resentencing. On remand, defendant was sentenced to 20 to 60 years in prison. Defendant appeals as of right. We again vacate the sentence and remand for resentencing. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Six weeks after defendant's arrest, MCL 333.7401(2)(a)(ii) was amended to change the quantity of cocaine needed for a conviction to 450 to 1000 grams, which was in excess of the quantity defendant possessed. In *Murray, supra*, slip op at 3-4, this Court cited *People v Claypool*, 470 Mich 715, 719-720; 684 NW2d 278 (2004), for the proposition that although the unamended version carried a mandatory 20-year minimum sentence, a departure was allowable if there were substantial and compelling reasons for it. The *Murray* Court held that the trial court did not state substantial and compelling reasons for departure where its reasons were the amendment of the statute, the fact that defendant had limited contact with the drugs involved, the conclusion that defendant had considerable family support (a finding that this Court determined was based on a conflicted record), and the fact that a lesser sentence would be imposed under the statutory sentencing guidelines. *Murray, supra*, slip op at 4-5. This Court therefore remanded "for resentencing within the statutory minimum sentence of 20 years and the statutory maximum sentence of 30 years, as dictated by the former version of MCL 333.7401(2)(a)(ii)." *Murray, supra*, slip op at 5.

On remand, the trial court noted its disagreement with this Court. The trial court also noted, however, defendant's "stellar" post-conviction conduct, which included schooling, substance abuse counseling, and attendance at a family awareness class. The trial court declined to depart because it concluded that if it did so, this Court would simply remand the case yet again. Defendant argues that, having recognized defendant's "stellar" post-conviction behavior, the trial court abused its discretion by declining to impose a lesser sentence simply because this Court might vacate such a sentence.

Preliminarily, we conclude that the law of the case doctrine does not preclude the relief requested. This doctrine would preclude *inconsistent* action with this Court's prior opinion. *Everett v Nickola*, 234 Mich App 632, 635; 599 NW2d 732 (1999). This Court's remand directed resentencing "as dictated by the former version of MCL 333.7401(2)(a)(ii)." *Murray*, *supra*, slip op at 5. While we acknowledge that our directive might have been more explicit and clear in stating so, the remand order did not preclude the trial court from departing downward from the guidelines, if there were objective, verifiable, substantial, and compelling reasons to do so, because the former version of this statute, coupled with the former version of MCL 333.7401(4), allowed for such a downward departure. As noted in our previous opinion, the factors relied on by the trial court in its attempt to justify a downward departure were *not* objective and verifiable. *Murray*, *supra*, slip op at 4-5. Our ruling did not prevent the trial court on remand from using *other* reasons for departure, if they in fact existed and were objective, verifiable, substantial, and compelling.

In *People v Fields*, 448 Mich 58, 77; 528 NW2d 176 (1995), the Supreme Court held that factors arising after arrest could be considered in departure decisions. See also *People v Hellis*, 211 Mich App 634, 650-651, 536 NW2d 587 (1995), where this Court held that a judge properly looked at favorable post-arrest information, primarily related to remedying substance abuse problems, in departing downward from the sentencing guidelines. In *People v Babcock*, 469 Mich 247, 264-265; 666 NW2d 231 (2003), the Supreme Court discussed decisions to depart in the context of departures from the statutory sentencing guidelines range, which also require substantial and compelling reasons. Citing *Fields*, *supra* at 62, 67-68, the *Babcock* Court held that

[t]he phrase "substantial and compelling reason" has, in our judgment, acquired a peculiar and appropriate meaning in the law and, thus, it must be construed according to such meaning. That is, a "substantial and compelling reason" must be construed to mean an "objective and verifiable" reason that "'keenly' or 'irresistibly' grabs our attention; is 'of 'considerable worth' in deciding the length of a sentence"; and "exists only in exceptional cases." [*Babcock*, *supra* at 257-258.]

The *Babcock* Court further held:

[T]he existence or nonexistence of a particular factor is a factual determination for the sentencing court to determine, and should therefore be reviewed by an appellate court for clear error. The determination that a particular factor is objective and verifiable should be reviewed by the appellate court as a matter of law. A trial court's determination that the objective and verifiable factors present

in a particular case constitute substantial and compelling reasons to depart from the statutory minimum sentence shall be reviewed for abuse of discretion.” [*Id.* at 264-265 (internal citations and quotation marks omitted).]

Also, if a trial court departed for invalid reasons and this Court cannot determine if the trial court would have departed to the same extent absent the invalid reasons, this Court must remand. *Id.* at 260. It follows that a remand is necessary if, as in this case, the trial court noted but failed to consider a valid reason and therefore did not depart, but might depart if the valid reason were considered.

The trial court’s finding that defendant performed well in prison was not clear error. It was chronicled in the Presentence Investigation Report. Coextensively, the finding was objective and verifiable as a matter of law. Moreover, it was significant and could be regarded as being of considerable worth in deciding the length of time that defendant should remain in prison. To the extent that the trial court noted the factor and then failed to consider it, it failed to exercise its discretion and, accordingly, abused its discretion. Thus, a remand for resentencing is necessary. We express no opinion regarding whether the trial court should once again depart from the minimum sentence.

We vacate defendant’s sentence and remand for resentencing. We do not retain jurisdiction.

/s/ Kurtis T. Wilder
/s/ Patrick M. Meter
/s/ Deborah A. Servitto